In The

Supreme Court of the United States

October Term, 1960

No. 434

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1960

No. 434

LONETTE SCHWENKHOFF, by
Guardian ad Litem, Vaughn S. Conway,

Petitioner,

vs.

FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

6 Wis. 2d 44, 93 N. W. 2d 867, rendered January 2, 1959, affirmed Order sustaining demurrer to entire complaint, with leave to plead over.

11 Wis. 2d 97, 104 N. W. 2d 154, rendered June 28, 1960, affirmed Judgment dismissing amended complaint by infant plaintiff as to father's insurer only, and extended option to infant and her co-plaintiff mother to replead their other causes of action stated.

Jurisdiction

Petitioner contends jurisdiction is conferred by 28 U. S. C. 1257 (3). Respondent contends that jurisdiction should not be accepted by this court because:

a) No substantial federal question is presented.

b) There are adequate non-federal grounds to support the Wisconsin court's decision.

c) To do so would constitute an unconstitutional assumption of power by this court over the State.

Questions Presented

1. May Wisconsin law constitutionally bar an unemancipated minor from recovery in its courts for personal injuries occasioned by the negligence of her father?

2. Does the XIV Amendment contemplate that this court shall review state court decisions duly decided under state law to determine whether it considers that they were correctly decided?

ARGUMENT

I.

NO FEDERAL QUESTION WAS PRESENTED BY THIS PURELY INTRASTATE CONTROVERSY, BROUGHT AND DECIDED UNDER STATE LAW.

This is a civil action brought by a Wisconsin citizen in the Wisconsin courts to recover from a Wisconsin corporation for injuries received in Wisconsin under the provisions of a contract of automobile insurance written in Wisconsin. It was decided by the Wisconsin Supreme Court on the basis of established Wisconsin law.

A. Local Law Clear.

The rule that an unemancipated minor may not recover for ordinary negligence of his parent was first enunciated by the Wisconsin court in *Wick* v. *Wick* (1927) 192 Wis. 260, 212 N. W. 787, 52 A. L. R. 1113, and was followed in *Zutter* v. *O'Connell* (1930) 200 Wis. 601, 229 N. W. 74. It was specifically extended to the parent's insurer in *Segall* v. *Ohio Casualty Co.* (1937) 224 Wis. 379, 272 N. W. 665, 110 A. L. R. 82, and *Lasecki* v. *Kabara* (1940) 235 Wis. 645, 294 N. W. 33, 130 A. L. R. 883. This rule was subsequently re-examined and re-affirmed in *Fidelity Savings Bank* v. *Aulik* (1948) 252 Wis. 602, 32 N. W. 2d 613, and *Wadoz* v. *United National Indemnity Co.* (1957) 274 Wis. 383, 80 N. W. 2d 262, which extended the rule to actions of parent v. child.

The Wisconsin legislature has clearly manifested its concurrence in the wisdom of this court-made rule, and the soundness of the public policy considerations from which it springs. In the decisions cited immediately above, the Wisconsin Supreme Court repeatedly directed critics of parental immunity to the legislature, declaring that any change in the firmly established judicial rule should properly come from the legislature, particularly since fundamental questions of public policy were involved. Yet, our legislature has never seen fit to alter the rule as announced and applied by the Court.

Just before this action was begun the 1957 Wisconsin legislature had refused to enact a bill specifically designed to abrogate the rule (Bill No. 689A, Senate Journal 1957 p. 1794). After the first decision in this case re-affirming the court's adherence to the rule, and containing a special concurring opinion expressly inviting legislative action, a bill to change it was introduced in the 1959 legislature. But this, too, was decisively defeated. (Bill No. 89S, Wis. Sen. Bulletin 1 30 60 p. 87, Journal of the Senate 4 23 59 at p. 607).

Thus, it is clear that the judgment under attack here is not only amply supported by Wisconsin law, but was clearly compelled by the state of Wisconsin authorities. And it is therefore valid unless this court is to now say to the state of Wisconsin that it will not be permitted to continue to follow the rule of law which its court has consistently adhered to with the manifest approval of its legislature.

B. Local Law Controls

And we respectfully submit that this court may not properly make any such pronouncement to the Wisconsin court, under the authority of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

That case also presented the problem as to whether an individual injured through negligence could be barred from a recovery by a state court rule. Tompkins was struck by an Erie train while trespassing on railroad property under circumstances whereby the railroad was found negligent. It was contended that the rule in Pennsylvania was that a trespasser could not recover for ordinary negligence on the part of the landowner. This court, in its now classic opinion, held that the federal courts were compelled by the U. S. Constitution to accept and apply this rule of substantive tort law of the state, even though the federal courts considered the Pennsylvania rule barring recovery to be an incorrect view of the law.

In Mr. Justice Brandeis' opinion for this court in the *Tompkins* case he said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." (304 U. S. at 78)

He further quoted with approval the prior statement of Mr. Justice Holmes that for this Court to refuse to accept the local law, as established by the state courts, was "an unconstitutional assumption of powers by courts of the United States . . ." (304 U. S. at 79)

We submit that if the federal courts must follow the local state law in these matters when brought in federal court, then it necessarily follows as an *a fortiori* proposition that the federal court must also permit the state courts to follow their own laws in deciding their own cases.

C. *No Violation of XIV Agreement*

Petitioner contends that this court should intervene here because the rule of parental immunity is legally unsound and the Wisconsin court's adherence to it therefore results in her being deprived of her property without due process of law, in violation of the XIV Amendment. But this contention requires consideration as to what is meant both by "property" and by "due process."

Due Process

Certainly, this petitioner has been afforded "due process," in the Wisconsin courts which have been dealing with her case over the past two and one-half years, with two separate reviews by the highest court in the state. We submit that due process may not properly be extended to incorporate the concept of the right to a favorable, or even a legally correct, decision; but rather, that it goes only to the process whereby the decision is reached.

To hold otherwise would emasculate the fundamental concept of *Erie R. Co. v. Tompkins*. For to say that an "incorrect" decision by a state court is a violation of due process is to say that this court may review every decision of every state court to determine whether it considers that the case was correctly decided, and therefore constituted due process. And whenever this court disagreed with the result in the state court it could then impose its view of the law on the state by simply declaring this was required by the constitutional guarantee of due process.

We also suggest that *Erie R. Co. v. Tompkins* indirectly, but necessarily, negates petitioner's contention that a bar to recovery based on an incorrect view of the law by the state court is a violation of due process. For there this Court did not question the lower federal court's view that the Pennsylvania rule was not the correct rule of law, but still held that the Constitution required that that rule be accepted and applied.

Deprivation of Property

As far as the claim of deprivation of property is concerned,—where has plaintiff been deprived of any "property" rights?

She claims a cause of action which the Wisconsin court has never recognized to exist, either by decision or statute. There is no claim that petitioner has a cause of action against her father under any federal statute or specific provision of the Constitution; and, as pointed out by Justice Brandeis in the portion of the *Tompkins* opinion quoted

above, there is no such thing as a federal general common law under which such cause of action could arise.

So, we submit, unless and until Wisconsin law recognizes that there is a cause of action in this minor injured by the negligence of her father, then there is no "property" right for her to be deprived of.

This is particularly true here since petitioner seeks to recover in tort. And, "Liability for a tort depends upon the law of the place of injury." *Young* v. *Masci*, 289 U. S. 253 at 258, 77 L. ed. 1158 at 1160, 53 S. Ct. 599. Thus, tort law runs through the spectrum from strict liability in certain cases to absolute immunity in others, with a myriad of shadings in between. The hue of the particular rule of tort law to be applied in each specific situation is in essence but a reflection of the public policy considerations involved in the particular circumstances presented as viewed in the light of the "felt necessities of the time" then prevailing in the jurisdiction involved.

There are many other examples where the law of tort declines to permit a recovery even though recognizing that damage flowed from the negligent act of another, e.g.: legal cause and scope of duty concepts, host-guest and husband-wife limitations and bars, death and survival statutes, contributory negligence, comparative negligence, assumption of risk, charitable and governmental immunities, etc. And there is a great variation in the applicable rules from jurisdiction to jurisdiction, and from time to time. Yet, these local bars to, and restrictions on, recovery do not constitute a violation of the federal Constitution.

Thus, in *Silver* v. *Silver*, 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A. L. R. 939, this Court held that Connecti-

cut could constitutionally abrogate the existing common law cause of action of a gratuitous passenger in an automobile against the driver for injuries resulting from ordinary negligence. And, Arkansas was permitted to bar recoveries by a guest in an automobile if the injured guest was related to the negligent driver within the third degree, despite the assertations of all of the same constitutional objections advanced here. *Harlow* v. *Ryland* (8th CCA), 172 F. 2d 784. Also, the Massachusetts law that one traveling on Sunday could not recover from the railroad for the negligence of its servants was upheld. *Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555, 31 L. ed. 795, 8 S. Ct. 974.

D. *Not Unconstitutional Class Distinction*

Petitioner alleges that she as an unemancipated minor, has been denied equal protection of the laws through "This class distinction without any legal basis or foundation" (p. 9). But the XIV Amendment does not require a "legal basis" for the establishment of class distinctions by a state in the administration of its local tort law.

The equal protection clause does not require things which are different in fact or opinion to be treated in law as though they were the same. *Tigner* v. *Texas*, 310 U. S. 141 at 147, 84 L. ed. 1124, 60 S. Ct. 879, 130 A. L. R. 1321. And the ultimate test of constitutional validity is not whether the treatment of classes differs, but whether the differences between them are pertinent to the subject with respect to which the classification is made. *Asbury Hospital* v. *Cass County*, 326 U. S. 207 at 214, 90 L. ed. 6, 66 S. Ct. 61. Thus, the equal protection clause of the XIV Amendment

voids what is done by a state only wher its action is without any reasonable basis and is purely arbitrary. *Morey* v. *Doud*, 354 U. S. 457 at 463, 1 L. ed. 2d 1485, 77 S. Ct. 1344.

Furthermore, the state's power to classify is recognized to be extremely broad, limited only by the doctrine that a classification may not be palpably arbitrary. *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U. S. 376, 4 L. ed. 2d 384 at 390, 80 S. Ct. 474. And this Court does not concern itself with the wisdom or soundness of distinctions drawn by the states in their classifications, but will look only to see if the local authorities, judicial or legislative, have some reasonable basis for their belief that the distinction is advisable. *Safeway Stores* v. *Oklahoma Retail Grocers Association*, 360 U. S. 334, 3 L. ed. 2d 1280, 79 S. Ct. 1196.

Petitioner contends that the Wisconsin Court's continued adherence to the doctrine of parental immunity should be struck down as an unconstitutional denial of the minor's rights because this is an "old antiquated" social concept (p. 8). But this Court in upholding a Michigan law restricting female bartender licenses to wives and daughters of licensed owners in cities of over 50,000 said:

> "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards * * *."
>
> *Goesaert* v. *Cleary*, 335 U. S. 464 at 466, 93 L. ed. 163, 69 S. Ct. 198.

Here the Supreme Court of Wisconsin, in consort with its legislature and sister courts, has concluded that the public policy to promote and protect family unity requires this distinction between minors who are dependent upon

their parents for support and those who are not. And it has said to the former: you may not bite the hand that feeds you. The bar applies with equal force to all unemancipated minors. And as long as a law applies to all members of a class alike, the constitutional requirements of equal protection are met. *Louisiana* v. *Resweber*, 329 U. S. 459 at 465, 91 L. ed. 422, 67 S. Ct 374. Also, unemancipated minors, and they alone, receive the benefit of the inverse immunity to tort suits by their parents.

Whether or not this court considers that the distinction thus drawn by the Wisconsin court is necessary or wise, we submit that it cannot be said to be so wholly without rational basis, so palpably arbitrary, as to warrant its being struck down as unconstitutional.

We further suggest that most of the authorities and considerations set forth above in the considerations of due process and invasion of property rights also support our position here. If, for example, Connecticut may draw the line between paying and non-paying guest, Arkansas may further subdivide non-paying guest at the 3rd and 4th degree of kinship, and Massachusetts may extend or retract liability upon the basis of a tick of the clock,—why may not Wisconsin draw this distinction between minors who are independent of and those who are dependent upon the parent they seek to sue?

E. V *Amendment Not Involved*

Petitioner also claims she was denied due process under the V Amendment. But, this amendment protects only against invasion of rights by the federal government, whose

conduct alone it limits. *Feldman* v. *U. S.*, 322 U. S. 487 at 490, 88 L. ed. 1408, 64 S. Ct. 1082, 154 A. L. R. 982. Since the complaint here is directed solely against the action of the Wisconsin court, with no claim of any impropriety by any federal court or agency, the contentions based on the V Amendment cannot be maintained.

F. *State Constitution Not Involved*

Petitioner's further contentions that the Wisconsin court has misconstrued the Wisconsin Constitution are also irrelevant in this court. For the Wisconsin court is the final authority as to the construction of the Wisconsin Constitution, and its construction of the state constitution is binding on this Court. *Louisiana* v. *Resweber*, 329 U. S. 459, 91 L. ed. 422, 67 S. Ct. 374.

II.

THERE IS NO CONFLICT IN THE AUTHORITIES.

The doctrine of parental immunity in tort cases is not only firmly entrenched in the law of Wisconsin, but it is supported by the overwhelming weight of authority throughout the United States, viz.:

> "As a general rule, in the absence of a statute to the contrary, an unemancipated minor child has no right of action against a parent for the tort of such parent."
>
> 67 C. J. S. 787 *Parent & Child* Sec. 61 (b) (2).

See also 39 Am. Jur. 735 *Parent & Child* Sec. 90; 19 A. L. R. 2d 423, and supplements thereto.

The extension of the immunity to the parent's insurance carrier by Wisconsin, upon the fundamental premise of liability insurance law that the company is not liable if its assured is not, is also in accord with the overwhelming weight of present-day authority. 67 C. J. S. at 788; 39 Am. Jur. at 736; 19 A. L. R. 2d at 435.

Petitioner's brief, at page 8, speaks of "a trend of reversals of this doctrine (that) has started to develop in other jurisdictions." But examination of the cases cited in support of the claimed trend away from the rule of parental immunity discloses that these cases are not in point here as they did not involve a situation of ordinary negligence causing injury to an unemancipated minor in a straight parent-child relationship. Most of these cases squarely recognize the doctrine of parental immunity to be the established law of the land, and then set out to carve an exception to that general rule under the particular circumstances presented there but not involved here.

A review of the most recent decisions on the point, collected in 1960 A. L. R. 2d Supp. Service at pp. 1612-1615, demonstrates that this rule is as firmly entrenched today as at any time since its inception. In fact, the adherence to the rule in the last twenty years in these ordinary negligence automobile accident cases has been universal throughout the country.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for Writ of Certiorari should be denied.

Respectfully submitted,

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